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Supreme Court of the United States

October Term, 1952

No. 311

AGRA B. WILLIAMS,
Petitioner,

v.

PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Supreme Court of the United States

October Term, 1952

No. .....

AGRA B. WILLIAMS,

Petitioner,

v.

PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN VIRGINIA, and AMERICAN SECURITY AND TRUST COMPANY, a corporation, EXECUTOR OF THE ESTATE OF MARY E. MAXWELL, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Agra B. Williams, respectfully prays that a writ of certiorari be isued out of and under the seal of the Court to review the decision of the United States Court of Appeals for the District of Columbia Circuit, hereinafter referred to as Court of Appeals, rendered on the 12th day of June, 1952, (R. 81-86) which in turn affirmed the judgment of the United States District Court for the District of Columbia, filed on July 24, 1951,

(R. 76-77), and the order entered on the 19th day of July, 1951, (R. 77-78).

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. No. 1254 (1).

The opinion of the United States Court of Appeals for the District of Columbia Circuit was filed on the 12th day of June, 1952, (R. 81-86). Orders staying a mandate to the thirtieth day of August, 1952, pending the filing of this petition for certiorari have been entered.

OPINION BELOW

The opinion of the District Court is found on page 62, et sequi, of the proceedings in the Circuit Court of Appeals. The conclusions of the District Court are found on pages 63-66 Id. and the order denying any recovery by Agra B. Williams on her motion for declaratory judgment and granting the cross motion for defendant, Protestant Episcopal Theological Seminary of Virginia, is found on pages 69 and 70 of the record. This opinion is not yet reported in the Federal Supplement.

The opinion of the Court of Appeals is found in the record. It was heard before Judges Proctor, Fahy and Washington and afterwards decided on June 12, 1952. The opinion has not yet been reported in the Federal Reporter, but it is printed in the record (R. 76-78).

QUESTIONS PRESENTED BY THIS PETITION

The questions presented here were raised in a declaratory judgment suit brought by petitioner, and by cross motion by respondent, Protestant Episcopal Theological Seminary in Virginia. The American Security and Trust Company has occupied a mere nominal position as a

party since the beginning of this litigation. It has been, more or less, an innocent by-stander. Hence, herein, when we refer to respondent, we mean the Theological Seminary. Both Courts below decided in favor of respondent.

Both the District Court and the Court of Appeals decided in this case that the Virginia law applied; but neither of them determined the questions of law accordingly.

The questions presented by this petition are:

(1) The Court of Appeals, except inferentially, did not pass upon the question whether the affidavits filed by respondent in support of its counter-motion for summary judgment could be considered by it over our objection, under Rule 56 (c) Federal Rules Civil Procedure. It is apparent that both the District Court and the Court of Appeals considered these affidavits and the so-called facts covered by them, when as a matter of law none of them, except, perhaps, the charter of respondent or so-called amendments from 1923, forward should have been considered on the motion.

2. Can the Virginia Theological Seminary in Virginia legally take by devise or bequest under the laws of the Commonwealth of Virginia? If it cannot take, then petitioner, as the only heir at law, takes.

3. Did the Court of Appeals follow the law of Virginia, as set out in its statutes and the decisions of the Supreme Court of Appeals of Virginia? It decided this case on its own conception of what it considered the law of Virginia ought to be, and which it is not.

4. Can respondent legally take under the non-stock corporation statute in Virginia? Isn't it bound by the general statute relating to devises and bequests for religious purposes and not otherwise?

5. Can respondent legally take under its charter, since the charter is silent as to the purposes of the corporation and of the right to take. The record here shows that the deficiencies of its incorporation are basic?

VIRGINIA CODE AND STATUTES INVOLVED

Sec. 154, Virginia Constitution, 1902
Report of Revisors of Virginia Code, chapters 77, 80, 1849.
Title 22, c. 77, Code of 1849
Report of Revisors as to c. 11, Acts 1839
Code of 1860, c. 80
Code of 1887, sec. 1420, 1426
Code of 1904, sec. 1419
Code of 1936, 1942, sec. 587, c. 32
Code of 1950, Vol. 8, title 55, sec. 55-26
Code of 1919, sec. 6
43 Elizabeth repealed 1792
Act January 24, 1799
Act January 12, 1801
Acts 1853-4, c. 107
Act December 16, 1875
Act March 25, 1873
Acts 1883-84, c. 523

RULES OF COURT

Rule 56 (c) and (e) Federal Civil Rules Procedure.

STATEMENT OF CASE

Early in 1949, Miss Mary E. Maxwell, a resident of the District of Columbia for many years, died, leaving a last will and testament, which was duly probated.

The defendant, American Security and Trust Company, qualified as executor. Under the twenty-seventh clause of her will, Miss Maxwell divided her residuary estate,

which consisted solely of personalty, into two parts—one-half, she bequeathed to Virginia Military Institute, and the other half she bequeathed to Protestant Episcopal Theological Seminary, both in trust. (R. 3-4).

Petitioner moved the District Court, if his finding should be for the Seminary, to state whether it took by virtue of the common or statute law of Virginia, and under what statutes it could take. The District Court did not directly answer this query. The Court of Appeals says respondent took under Sec. 587 of the Code of 1919 (R. 84). The Court of Appeals affirmed the District Court (R. 81 et seq.), held in substance that a corporate theological seminary had a right to take by devise or bequest in Virginia as an educational or charitable beneficience, and that the other points of error raised by petitioner, to-wit: (a) objection to the use of the affidavits, (b) whether respondent could take as a non-stock corporation or under its supposed charter, were not meritorious. (See last sentence of opinion (R. 86).

Hence this application for a writ of certiorari.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

(1) In considering any part of the affidavits, except the so-called amendments made after petition by the Corporation Commission of Virginia of July 31, 1923.

(2) In determining that the respondent could legally take by devise or bequest under the laws of the Commonwealth of Virginia.

(3) In refusing to follow the law of Virginia in force at the time this will took effect, and as interpreted by the decisions of the Supreme Court of Appeals of Virginia.

(4) In determining in effect that respondent could take under the non-stock corporation law of Virginia and was not bound by the law relative to bequests for religious purposes as defined by the Virginia law.

(5) In determining that respondent could legally take under its charter since the charter is silent as to the purposes and right to take and since the deficiencies of respondent's incorporation are basic, and it has not complied with the basic rules laid down by the Virginia statute to insure its incorporation as a non-stock corporation.

REASONS RELIED UPON FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit has failed to apply the Virginia statutes and to follow the Virginia decisions in its determination of a question of law that should be controlled entirely by the law of the State of Virginia. Thus, although the assets of the estate being administered are located in the District of Columbia, the question as to the legality of the beneficiary receiving the bequest is one to be determined solely by the law of the State of Virginia. The Court of Appeals so decided. In its failure, however, to follow the law of the State of Virginia on this question, the Court of Appeals has, in effect, re-written the law of the State of Virginia with respect to the ability of a theological seminary to take under wills, thereby usurping functions of the General Assembly of Virginia and the Virginia courts. The resulting confusion and error have caused serious loss to your petitioner and renders uncertain the administration of estates not only in the State of Virginia but elsewhere, as in the instant case, and particularly in the District of Columbia, where numbers of Virginia estates are administered by trust companies here domiciled. Because, too, there is now a variance between the Virginia law, as declared by its statutes and interpreted by its courts, and as interpreted

by the courts of the District of Columbia, this becomes a matter of public interest that should be definitely and finally settled.

Because of the long history of the statutes involved and the many amendments and cases construing them, this brief is more verbose than it would otherwise be. The indulgence of the Court is, therefore, requested.

(1) Were the Affidavits Filed by the Defendant in Support of Its Counter-Motion for Summary Judgment in Proper Form as Required by Rule 56 (c) Federal Rules Civil Procedure so as to be Properly Considered?

Being a question of adjective law, as distinguished from subjective principles, this part of this matter must be determined by the rules of the Federal Court in the District of Columbia.

To sustain its motion, appellee filed a number of affidavits, (R. 16-20), only part of one of which we respectfully submit was in proper form or content to be considered by the trial court or the Court of Appeals in arriving at their respective conclusions. This had reference to the basic charter from 1923 forward. Those, which we submit were not proper in that regard, are treated briefly hereafter. Petitioner moved to strike the same in due time. This motion was never passed upon by the judge of the trial court. In his written memorandum opinion, the trial court made no reference to the facts contained in the affidavits, but if these facts were taken into consideration by him, or the Court of Appeals, and from the opinion of the latter, they had to be, palpable error is present.

It is too well settled not only in this Court but everywhere throughout the Federal Judiciary that in order to properly obtain declaratory judgment under Rule 56 (c), the record before the Court at the time of the motion, including the pleadings, depositions and affidavits must

show clearly that "there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." These affidavits attempt to raise quesions of fact and should have been affirmatively disregarded, because they did not show any *personal* knowledge of the facts contained in them.

Farrall v. *D. C. Amateur Athletic Union*, 80 U. S. App. D. C. 396, 153 F. (2d) 647, held that affidavits may be used *for the purpose of discovering whether there is an issue of fact, but not for the purpose of deciding an issue of fact.*

See, also, *Fox* v. *Johnson Wimsatt*, et al., 31 F. Supp. 64.

In that case, as here, it was sought to prove by irrelevant and immaterial evidence facts not admissible in any event.

For the reasons herein stated, we respectfully urge that the affidavits referred to above should not have been considered. It is evident that the District Court, (R. 65) and the Court of Appeals, (R. 84-86) took these affidavits and the exhibits attached into consideration.

See, also, discussion under Specification of Errors, points 4 and 5 herein.

(2) Can Virginia Theological Seminary in Virginia Legally Take by Devise or Bequest Under the Laws of the Commonwealth of Virginia? If it Cannot Take, then Petitioner, as Only Heir at Law, Takes.

(3) Did the Court of Appeals Follow the Law of Virginia, as Set Out in its Statutes and the Decisions of the Supreme Court of Appeals of Virginia, or Did it Decide This Case on its Own Conception of What it Considered the Law of Virginia Ought to Be, and Which it Is Not?

(a) *Can Respondent Take Under the Common Law?*

A charitable bequest in Virginia is void at common law. If the Statute of 43 Elizabeth, relating to charitable uses, was ever in force in Virginia, it was repealed by the Virginia statute of 1792.

Gallego's Exor. v. *The Attorney General,* 3 Leigh 450, (1842)
Fitzgerald v. *Doggett's Exor.* (1930) 155 Va. 112, 155 S. E. 129, especially at page 132.
Triplett v. *Trotter* (1937), 169 Va. 440, 193 S. E. 514-516
Kelly v. *Love's Administrators,* (1870), 20 Grat. 124.

(b) *Is There Any Statute in Virginia Abrogating or Changing the Common Law Rule and Permitting Respondent to Take by Devise or Bequest?*

It is imperative that the history of Virginia legislation should be taken into consideration.

Thomas Jefferson's statute for establishing religious freedom was passed on December 16, 1785. It was followed by the Act of 1798, chapter 9 (January 24, 1799.) Under this act, many of the Acts previously passed, including an act for incorporating the Protestant Episcopal Church, and an act giving certain powers to the trustees of the property of the Protestant Episcopal Church, were repealed, and the Bill of Rights was declared to be a true exposition of the principles of the Bill of Rights and the Constitution.

This statute was followed by the Act of 1801, c. 5, confiscating all the vacant glebe lands in the State, formerly belonging to the established church, and turning them over to the Overseers of the Poor.

Following *Literary Fund* v. *Dawson,* (1839) 10 Leigh 147, the General Assembly passed the Act of 1839, c. 12, on April 2, 1839, the seventh section of which, hereafter quoted, is of material moment in this case.

The legislative policy is best illustrated by the Revisors' report of the Code of 1849, with relation to section 8, of chapter 77, which permitted grants or devises of land for the use of any religious congregation, "or for religious or other instruction", etc. to be held. The General assembly struck out these latter words and passed the statute with this particular language out of it.

Again, the Report of the Revisors amended the act of 1839 above, by incorporating in the Code (Title 23, Chapter 80, Code of 1849) after the words "other than for the use of a theological seminary", the words "or purposes of religious education." This language was incorporated in the Code as "other than for the use of a theological seminary."

This language was carried into the Virginia Code of 1860. It was amended by the Act of March 25, 1873, to include colored persons, but the language "other than for the use of a theological seminary" was still retained.

Following Kain, *Bishop of Wheeling* v. *Gibboney, Exor.*, (1870), 11 Otto 362, 25 L. Ed. 813, evidently the General Assembly observed a shortcoming in the statute, which then provided for a trust made to a body corporate or unincorporated, or to a natural person, in that it did not cover trusts "for the use of." This was covered by inserting the words, in section 1420, of the Code of 1887, the following:

> "Nothing in this section shall be construed as to give validity to any devise or bequest *to or for* the use of any unincorporated theological seminary."

These words "to or for the use" plug the gap so that no bequest could be made to any person or corporation "to or for the use" of an unincorporated theological seminary.

The language of the 1839 Act prohibited devises or bequests to a theological seminary. This Act, as amended, added devises or bequests "to or for the use."

The Act in force at the time of the death of the testatrix is as follows:

> "Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons within this State, and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons within this State, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devise or bequest, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighten hundred and thirty-nine, entitled 'an act concerning devises made to schools, academies, and colleges.' Nothing in this section shall be so construed as to give validity to any devise or bequest *to or for the use* of any unincorporated theological seminary."

The seventh section of the 1839 act, made part of the statute, is as follows:

> "AND BE IT FURTHER ENACTED, That at the term next ensuing the admission of such will to probate, or next ensuing the reception of the said copy of the will and certificate of the probate aforesaid, the said court shall report the case to the legislature, together with the report of the commissioner or commissioners appointed to ascertain the value of the subjects, or estate devised or bequeathed, with any other matter it may think proper. And if the legislature shall refuse at its next session, or fail within two successive sessions after the reception of the said report from the court aforesaid, to incorporate such school, academy or college, the said devise or bequest shall fail and be void. But no act incorporating such school, academy or college, shall take away any right of the heirs or distributees to impeach the

validity of such devise or bequest which they would have had if it had been given or made to any natural person or body incorporated at the time of making the devise or bequest: PROVIDED, *That nothing in this act contained shall be so construed as to give validity to any devise or bequest to any theological seminary.*"

This is the old section 587 found in the several Codes of 1936 and 1942, and is now in the new Code which went into force after Miss Maxwell's death as the Code of 1950, vol. 8, title 55, chap. 2, being section 55-26. (Italics above are those of petitioner.)

Quoting from 2 Lewis' Sutherland Stat. Constr. (2nd Ed.) 787, 788, Mr. Justice Roberts, in *Hassett* v. *Welch*, 303 U. S. 303, 314, 82 L. Ed. 858, 866, said:

"Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. • • • Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent."

See, also, *In re Heath*, 144 U. S. 92, 36 L. Ed. 358, point 2 of syllabus.

In *Commonwealth, ex. rel City of Richmond* v. *Chesapeake & Ohio Railway Company*, (1916), 118 Va. 261, 87 S. E. 622, 626, the law is thus laid down:

"While certain authorities appear to sustain the proposition that an act which has been repealed cannot be amended, these authorities are against the decided weight of authority, and, in our opinion, are unsustained by reason."

See, also:

U. S. v. *The Brazil* (1943) (7th Cir.) 134 Fed. (2nd) 929 (1st point of syllabus.)

The statute under consideration, above, was slightly amended by an act of 1914 which added to the above

statute the words: "and every gift, grant, devise or bequest hereafter made for charitable purposes", before the words "whether made in any case to a body *corporate* or incorporate", etc. Thus it regulated bequests to a corporation such as respondent.

Our contention is that the above act, including the section from the 1839 act, applied only to devises and bequests for literary and charitable purposes and never applied to bequests or devises for theological seminaries, except to forbid them.

In *Kelly* v. *Love's Admr.*, (1870) 20 Grat. (61 Va.) 124, Judge Staples, construing this section seven of the 1839 Act, made part of the statute known as section 587 of the Virginia Code of 1919, and as retained in the 1950 Code, says on page 131;

> "I think the object of the Legislature, in passing the act, was to change the rule laid down in the cases before cited," (Gallego's Exor. v. Atty. Gen., 3 Leigh, 450; Brooke v. Shacklett, 13 Grat. 301; Seaburn's Exor. v. Seaburn, 15 Grat. 423) "controlling bequests and devises for the establishment of schools and colleges, *leaving it in full operation so far as it applied to bequests and devises for religious purposes.*"

Respondent took the position below that because it is a corporation, it can take. This theory was adopted by the Court of Appeals. The rule is not so simple. Bequests to a corporation are confined to bequests for purposes "distinctly defined" in the corporate charter.

To sustain its position that it could take the bequest, respondent cited four cases:

1st. *Roy's Exor.* v. *Rowzie* (1874) 25 Grat. (66 Va.) 599.

This case merely validated a bequest by a testatrix in Virginia to a South Carolina corporation, properly authorized by its charter to take.

2nd. *Protestant Episcopal Education Society* v. *Churchman,* (1885), 80 Va. 718.

This case involved a bequest to a corporation founded in 1875 for the collection of money to be used by the trustees of the corporation for the education of poor young men for the Episcopal ministry. The case attempted to overrule *Gallego* v. *Attorney General,* 3 Leigh, 450, and several other Virginia cases, as well as *Baptist Assoc.* v. *Hart,* 4 Wheaton 1. Tens of pages of opinion might have been saved, for Judge Richardson, who begins his opinion on p. 755, finally says, on p. 782:

> "In this case we have no concern with the *statutory* exception as to a theological seminary, as the bequests here are not to make a seminary."
> All the remainder was and is obiter dicta.
> (*Fifield* v. *Van Wyck* (1887) 94 Va. 557, 27 S. E. 446.)

3rd. *Trustees* v. *Guthrie,* (1889), 86 Va. 125, 10 S. E. 318.

This was a bequest by a Virginia testator to a North Carolina corporation, having for its purpose the power to acquire property, inter alia, for Christian education. The bequest was for general purposes of the charter and not for a theological seminary.

Judge Richardson again wrote the opinion, criticising the several cases decided by this Court and the Virginia court, but is careful to hold that the facts show that the bequest is not to a theological seminary, although he discusses what would happen if the bequest were made to respondent in this case.

Apparently Judge Lewis was not so sanguine even then about Judge Richardson's opinion. See note at end of case on page 326 of 10 S. E.

Here Judge Richardson, interpreting *Roy* v. *Rowzie,* supra, says:

"Roy v. Rowzie, 25 Grat. 612, was the case of a Virginia bequest to a theological seminary chartered by the legislature of South Carolina. The Court held the bequest valid * * *."

4th. *Fitzgerald* v. *Doggett's Exor.* (1930) 155 Va. 112, 155 S. E. 129.

This was not a bequest to or for a theological seminary. It was the bequest for the creation of a fund, by the testator for the relief of superannuated ministers of the Virginia Conference of the Southern Methodist Church. The case is not in point here, although it recognized that an indefinite charity to an incorporated body having the same chartered object and purpose, was good.

Fifield v. *Van Wyck,* (1897), 94 Va. 557, 27 S. E. 446, overruled all the dicta in the *Churchman* and *Guthrie* cases, re-established the cases overruled or attempted to be overruled by these cases. "We are unwilling to hold", said the opinion of the Court, "that this line of decisions, running back over a period of more than 50 years, was overturned by expressions of opinion in the *Churchman* and *Guthrie* cases. If further changes are necessary or desirable upon the subject, the legislature, the law making power, and not the courts, should make them."

The Court of Appeals says that this statute applies only to unincorporated theological seminaries and that the exception above is inapplicable. "From this it follows," says the opinion, "that if the bequest is for either educational or charitable purposes it is valid, unless the reference to bequests which have failed under the Act of 1839, leads to a different result. That the present bequest is for educational or charitable purposes is clear from its terms, considered in conjunction with the character and purposes of the seminary."

Religious purposes have been considered as among charitable purposes and charitable trusts, *except in Virginia.*

2 Bogert on Trusts, sec. 322.

In *Moore* v. *Perkins,* (1937), 169 Va. 175, 192 S. E. 806-810, (on page 810) Judge Hudgins calls attention to the fact that the Legislature, invalidating charitable trusts by adopting the Code of 1849, chapters 77 and 80, and the Code of 1887, chapters 64 and 65, made a marked distinction between trusts for religious purposes and trusts for literary or educational purposes. Said Judge Hudgins, after first holding, page 810, that prior to the *Gallego* case, supra, "no charitable trust was valid in this jurisdiction" says on p. 811, of 192 S. E.:

> "But, as pointed out above, section 587 deals primarily with charitable trusts for literary and educational purposes. The phraseology of the statute, as originally drawn, has been maintained through the successive re-enactments of the Legislature since 1839. Some of the restrictions imposed upon trusts for religious purposes have been eliminated from time to time, but some still remain and are found in the Constitution and in chapter 7 of the Code of 1919. It could hardly be the intent of the Legislature, in the use of the words 'charitable purposes,' as set forth in section 587, to remove all restrictions upon trusts for religious purposes without specifically amending other sections of the Code dealing with that subject."

Commenting on section 587 of the Code of 1919, (Code 1950, vol. 8, title 55, chap. 2, being section 55-26,) Judge Hudgins adopts the language of Harrison on Wills, which is the leading text book authority in Virginia and West Virginia, written decades after the above statute was amended by the addition of the last sentence with relation to trusts for unincorporated theological seminaries:

> "It does not seem to affect religious donations or beneficial orders and associations. It can hardly be supposed that the Legislature intended to repeal the sections which elaborately provide how far religious trusts are valid or trusts in favor of beneficial orders are valid by an amendment *to a section applicable*

only to educational and literary trusts. Therefore it can be safely said that religious donations are not affected by the Act, but are controlled by the sections of the Code specifically made applicable to them." (p. 812 of 192 S. E.)

There is no question but that eleemosynary corporations are permitted in Virginia to take like the one in *Jordan's Administratrix* v. *Richmond Home for Ladies,* 1 Va. App. 117, 56 S. E. 730, if it has the right under its charter, and such devise or bequest is in accordance with the purposes for which it was formed.

In *Maguire* v. *Loyd,* decided on December 3, 1951, 193 Va. 138, 67 S. E. (2d) 885, the Court, speaking through Mr. Justice Smith, had this to say:

"Religious purposes have been considered as among charitable purposes and charitable trusts have been deemed to include trusts for religious purposes in England and in most of our States for many years. See 3 Scott on Trusts, sec. 371; Restatement of the Law of Trusts, sec. 371. But such has not been the situation in Virginia. See 2 Bogert on Trusts and Trustees, sec. 322. In the case of Moore v. Perkins, supra, the opinion, 169 Va., at page 182, 192 S. E. at page 810, refers to the decision in the Gallego case and relates the beginning of the law in this State as follows: 'While the decision makes no distinction between a trust for religious use, and a trust for any other charitable purpose, the evil resulting from trusts for religious purposes was emphasized in the opinion. It was there suggested that, if the people of the Commonwealth desired to legalize any such trust, it should be done through legislative enactment.' Following this suggestion the Legislature, in validating charitable trusts, made a marked distinction between trusts for religious purposes and trusts for literary or educational purposes. See chapters 77 and 80 of the Code of 1849, and chapters 64 and 65 of the Code of 1887."

"The distinction between trusts for religious purposes and trusts for literary or educational purposes

has continued down to the present time. Therefore, our discussion herein will be confined to trusts for religious purposes."

See, also, *Triplett* v. *Trotter,* (1937) 109 Va. 440, 193 S. E. 514, 516.

Even if the Court of Appeals were right, when it determined that the bequest here came under section 587 of the 1919 Code of Virginia, the bequest is invalid because of the prohibition in the seventh section of the Act of 1839.

The statute referred to "body corporate or unincorporated", and referring back to the 1839 Act, excepts "*any* devise or bequest to any theological seminary."

The Court of Appeals says that this language applies only to unincorporated theological seminaries. This is in the teeth of a fundamental rule of construction, and the word "any" in the 1839 Act.

The statute covers *any* devise or bequest to *any* theological seminary. The word "any" is comprehensive. *Warders* v. *Arell,* 2 Wash. (Va.) 282, 298, 299; *Walker* v. *Temple,* 130 Va. 567, 107 S. E. 720.

See Virginia Code of 1942, sec. 5, par. 13 and cases there cited, which was in effect when testatrix died and is now Virginia law.

See, also:

U. S. v. *Amedy,* 11 Wheat. 392, 412, 6 L. Ed. 502, 507.
Beaston v. *Farmers Bank,* 12 Peters 102, 134, 9 L. Ed. 1017, 1030.
Stribbling v. *Bank,* 5 Randolph (Va.) 132.
Crawford v. *Board of Supervisors,* 87 Va. 110, 12 S. E. 147.

We have covered the reason for the last proviso "to or for the use" of any theological seminary following *Kain* v. *Gibboney,* 11 Otto, 302, supra.

Petitioner emphatically urges that the only thing left of the seventh section of the 1839 act is the inhibition of theological seminaries to take by devise or bequest. The reference to it in section 587 is otherwise meaningless.

Following an interrogatory, the respondent admitted that it was a theological seminary, (R. 60).

Next the Court of Appeals holds that the language of the Act of 1839 "have failed or become void" is in the past tense; therefore it cannot help the petitioner here. *No devise or bequest can fail or become void until the time arrives for it to take effect.* Then at that time, the law says, in effect, the bequest becomes void, or shall become void, because the respondent cannot take. In other words, the Court of Appeals says that in the many editions or revisions of the Code of Virginia for the last one hundred years, the General Assembly by incorporating the seventh section of the Act of 1839, has been using meaningless language. It holds in effect that the statute is an absurdity.

The language must be given a sensible construction and application.

Commonwealth v. *Armour,* (1916) 118 Va. 242, 87 S. E. 610. Affirmed 246 U. S. 1, 62 L. Ed. 547.

The history of a statute may be taken into consideration in ascertaining its true meaning. (*U. S.* v. *Lacher,* 134 U. S. 624, 33 L. Ed. 1080; *American Air Lines, Inc.* v. *Battle,* 181 Va. 1, 23 S. E. (2d) 796). The intention of the law makers constitutes the law and the primary object in interpreting a statute is to ascertain that intention. The thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. (*Church of the Holy Trinity* v. *U. S.,* 143 U. S. 457, 36 L. Ed. 226; *Anglin* v. *Joiner,* 181 Va. 660, 26 S. E. (2d) 58.) The real purpose and intention of the Legislature, is the thing to be ascertained

in the construction of a statute, and to effect this, the general meaning of the words may be restricted. (*Orange and Alexandria Railroad Company* v. *Alexandria*, 17 Grat. 176.) All of the provisions of the statute must be given effect, (*American Air Lines* v. *Battle*, supra) and the Court will not hold any sentence, clause or word as unmeaning or surplussage if a construction can be legitimately found which will give force to and preserve all of the words of the statute. (*King* v. *Empire Collieries Co.*, 148 Va. 585, 139 S. E. 478.) A Court will not be prevented from giving effect to a legislative intention of which it is satisfied by a too rigid adherence to the very word and letter of the statute. (*Barrett* v. *Van Pelt*, 268 U. S. 85, 69 L. Ed. 857.) If in giving grammatical effect, a section or sentence is ambiguous, the application of grammatical rules will not be permitted to defeat the purpose of the act, if otherwise ascertainable. (*Harris* v. *Commonwealth*, 142 Va. 620, 128 S. E. 578.) In construing a statute, the old law, the mischief and the remedy must be considered and the statute under consideration must be given an interpretation, if possible, which will suppress the mischief and advance the remedy. (*Newton* v. *Employers Liability Assurance Corporation*, 4th Cir., interpreting Va. statute, 107 Fed. (2nd) 164. Cert. denied 309 U. S. 673, 84 L. Ed. 1018.) The words of a statute should be given their natural and ordinary meaning, unless contrary legislative intention plainly appears. The legislative intention should prevail over literal sense and strict letter and terms used. (*Franklin & P. Railway Co.* v. *Shoemaker's Committee*, 156 Va. 619, 159 S. E. 100; *Simpson* v. *Simpson*, 162 Va. 621, 175 S. E. 320. Cert. denied 295 U. S. 735, 79 L. Ed. 1683.) If a literal interpretation of any part of a statute would operate unjustly or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. (*Haydenfeldt* v. *Daney Gold & Silver Mining Company*, 3 Otto 634, 23 Law Ed. 995; *Tillinghast* v. *Tillinghast*,

(D. C. Circuit) 25 Fed. Rep. 2nd. 531; *Buzzard* v. *Commonwealth,* 134 Va. 641, 114 S. E. 664; *Miller* v. *Commonwealth,* 180 Va. 36, 21 S. E. (2) 721; *Ferguson* v. *Ferguson,* 169 Va. 77, 192 S. E. 774.)

This statute, then, according to this Court and the Virginia court, if ambiguous, must be construed to give it the effect intended by the General Assembly, however it is expressed. It cannot be meaningless or absurd.

In the absence of clear expressions to the contrary, a law is presumed to operate prospectively only.

Hassett v. *Welch,* 303 U. S. 303, 82 L. Ed. 858, (p. 6 syl.)
Ferguson v. *Ferguson,* 169 Va. 77, 192 S. E. 774, (p. 3 syl.)
Duffy v. *Hartsock,* 187 Va. 406, 46 S. E. (2d) 570, (p. 7 syl.)
Code of Virginia of 1919, sec. 6.

We submit that the interpretation of the statute by the Court of Appeals is antagonistic to the law as determined by this Court, as well as that of Virginia.

We submit that there is no statute in Virginia permitting respondent to take by devise or bequest, but that there is a statute emphatically forbidding the taking by a theological seminary.

(4) Can Respondent Legally Take Under the Non-stock Corporation Statute in Virginia? Isn't it Bound by the General Statute Relating to Devises and Bequests for Religious Purposes and Not Otherwise?

(5) Can Respondent Legally Take Under its Charter, Since The Charter is Silent as to Purposes of Corporation and Right to Take and Since the Record Here Shows that the Deficiencies of its Incorporation Are Basic?

The Protestant Episcopal Seminary and *High School* was incorporated in 1854, while the Code of 1849, pro-

hibiting devises or bequests to theological seminaries was and is now in force. This statute thus became a part of its charter.

Assuming there was no statutory prohibition as outlined above, it could only take under its charter by devise or bequest if the provisions of the charter permit. It could not take merely because it was a corporation. Being a mere creature of the law, a corporation possesses only those properties which the charter of its creation confers upon it. *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 636, 4 L. Ed. 629, 659. Corporations created by statute must depend both for their powers and the mode of exercising them, upon the true construction of the statute itself. *Bank of U. S.* v. *Dandridge,* 12 Wheat. 64, 68, 6 L. Ed. 552, 554. In *Literary Fund* v. *Dawson,* (1839), 10 Leigh (37 Va.) 147, the Virginia Court held that the Literary Fund was not authorized by its charter to take for the benefit of three separate institutions of learning and the Court suggested an amendment to the charter, which was afterwards done.

Fifield v. *Van Wyck,* (1897) 94 Va. 557, 27 S. E. 446, 450, limited the validation of any devises to purposes distinctly defined in the corporation charter.

Several amendments were gotten to the charter of the Protestant Episcopal Seminary *and High School* prior to the adoption of the Virginia Constitution of 1902. Under the latter the General Assembly was precluded from passing any law "creating private corporations or amending, renewing or extending the charters thereof." (sec. 63, sub-section 17, Const.)

Charters are to be construed most favorably to the State. (*Chevango Bridge Co.* v. *Binghamton Bridge Co.,* 3 Wall (70 U. S.) 51.)

Section 154 of the Constitution provided that by amendment all exclusive rights and privileges theretofore granted were surrendered. See *Winfree* v. *Riverside Cotton Mills,* (1912), 113 Va. 717, 75 S. E. 309.

Non-stock and stock corporations were put upon a different footing. The Virginia Court held that the stock corporation act did not apply to non-stock corporations. See *Jones* v. *Rhea,* (1921), 130 Va. 345, 107 S. E. 814. And under section 154, rights, powers and privileges not found in general laws do not exist. See *ex parte Norfolk Ry. and Light Co.,* (1925) 142 Va. 323, 128 S. E. 682.

Therefore if this 1854 corporation had any power to take, and we know of no reason why it had, then the first amendment after 1902, if amendment it be, put it under section 154. But the only power it had under the 1854 act was to appoint officers and collect money. Passing the other amendments gotten from time to time did not enlarge these purposes.

A complete new charter, divorcing the High School from the Seminary, (it being admitted in argument that the High School had an independent charter), was applied for under the guise of an amendment and granted July 31, 1923, (R. 47, et sequi.) It was then incorporated as The Trustees of the Protestant Episcopal Theological Seminary in Virginia, afterwards the words "The Trustees of the" were discarded, (R. 53.) Thus, if it did have a right to take prior to that time, because of the inclusion of the "High School" provisions of its charter, it became after this amendment a theological seminary.

This so-called amendment of 1923 is in fact a complete new charter under the new Constitution and the new non-stock corporation statute. Amendments were gotten to the new organization under the 1923 charter on June 29, 1933, and July 2, 1937.

The non-stock corporation statute says that the certificate, inter alia, shall state: (a) the name of the place where it is to be located; (b) the purposes for which it is formed; (c) the names and addresses of the trustees who are to manage its affairs for the first year of its existence; and (d) the period, if any, limited for its duration. So some effort was made to comply. But as it stands;

(a) No place of its principal office is anywhere named, either in 1923, theretofore or thereafter,

(b) *No purpose is set out.* This is fatal.

1 Fletcher on Corporations, sec. 100, p. 360

(c) The names and addresses of the trustees for the first year.

Not only is this provision not complied with, but the names of the incorporators of the Seminary and High School in 1854, seventy-five years before, are inserted. The Court will assume that all of them had then passed away.

(d) No period is given for the length of corporate existence.

There is nothing in the charter "distinctly" defining the purposes for which devises can be taken. *Fifield* v. *Van Wyck,* supra.

The granting of charter or amendment by the State Corporation Commission, under the 1902 Constitution, now in force, "is purely ministerial and it cannot refuse application" for charter. Under this new constitution, corporations have no rights, powers or privileges not found in general laws.

Ex parte Norfolk Ry. and Light Co., (1925), 142 Va. 323, 128 S. E. 602.

The reasoning of the Court of Appeals, then, that the charter of this respondent "has been acted upon by the Legislature of Virginia in the last 98 years" is a fallacious statement. The first application after the 1902 Constitution and the present statute put this respondent on a completely different footing.

Why the Court of Appeals did not follow the Virginia statute, as interpreted by the Virginia Court, when the cases were called to its attention, is one of the enigmas of the times. Certainly up to this time the petitioner's rights have been completely disregarded.

It is respectfully submitted that if ever a strong petition was ever filed, there is here presented a proper occasion for the exercise of the supervisory power of this Court.

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